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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

ELVA ROMRELL,

Plaintiff and
Respondent,

vs.

ZIONS FIRST NATIONAL BANK,
N.A., and ZIONS FIRST NATIONAL
BANK OF OGDEN,

Defendants and
Appellants.

* * * * *

RESPONDENT'S PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

* * * * *

Appeal from the Judgment of the Second Judicial
District Court of Weber County, Utah
Honorable Ronald O. Hyde, Judge

* * * * *

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IN THE SUPREME COURT OF THE STATE OF UTAH

ELVA ROMRELL,	:	
	:	
Plaintiff and	:	
Respondent,	:	
	:	
vs.	:	NO. 16211
	:	
ZIONS FIRST NATIONAL BANK,	:	
N.A., and ZIONS FIRST NATIONAL	:	
BANK OF OGDEN,	:	
	:	
Defendants and	:	
Appellants.	:	

RESPONDENT'S PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

Appeal from the Judgment of the Second Judicial
District Court of Weber County, Utah
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IN THE SUPREME COURT OF THE STATE OF UTAH

ELVA ROMRELL,)	
Plaintiff and)	
Respondent,)	
v.)	PETITION FOR REHEARING
ZIONS FIRST NATIONAL BANK,)	
N.A., and ZIONS FIRST)	No. 16211
NATIONAL BANK OF OGDEN,)	
Defendants and)	
Appellants.)	

Plaintiff and Respondent hereby petitions the Court for a rehearing in the above-entitled matter upon the grounds and for the following reasons:

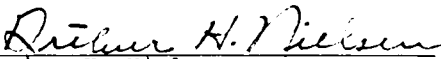
1. This Court erred in determining that the jury in this case was an "advisory" jury.
2. This Court erred in concluding that because the Clerk's Minute Entry (which was not signed by the trial judge) stated "Plaintiff's counsel to prepare and submit the Findings of Fact and Conclusions of Law and the Decree for the Court's signature," the trial judge contemplated the entry of Findings of Fact and Conclusions of Law and that Plaintiff's counsel failed to comply with the Court's direction.
3. This Court erred in determining that the trial court intended the jury verdict to be merely advisory.
4. This Court erred in not giving Plaintiff and Respondent

the trial court to make Findings of Fact and Conclusions of Law constituted reversible error.

5. This Court erred in determining that the failure of the trial court to make Findings of Fact and Conclusions of Law was reversible error under the facts of this case.

Plaintiff and Respondent submits herewith a brief in support of this Petition for Rehearing.

DATED this 19th day of May, 1980.


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IN THE SUPREME COURT OF THE STATE OF UTAH

ELVA ROMRELL,)	
)	
Plaintiff and)	
Respondent,)	
)	
v.)	No. 16211
)	
ZIONS FIRST NATIONAL BANK,)	
N.A., and ZIONS FIRST)	
NATIONAL BANK OF OGDEN,)	
)	
Defendants and)	
Appellants.)	

BRIEF OF RESPONDENT IN SUPPORT OF
PETITION FOR REHEARING

STATEMENT OF THE CASE

This is an action for specific performance of an oral contract to sell Plaintiff a dairy farm comprised of 160 acres of real property in Weber County, Utah, or, in the alternative, for compensatory damages for fraud.

DISPOSITION IN LOWER COURT

Following the court's denial of Defendants' motion for a directed verdict and the presentation of the defense, the jury unanimously returned a general verdict finding the issues in favor of the Plaintiff on her claim for specific performance. Plaintiff's alternative claim for damages was thereby rendered moot. The trial court entered judgment thereon, directing the Defendants to convey the real property in question to the Plaintiff. The trial court subsequently denied Defendants' motion for judgment

notwithstanding the verdict or, in the alternative, for a new trial, whereupon Defendants appealed.

DISPOSITION IN THE SUPREME COURT

The Supreme Court set aside the judgment and remanded the cause to the district court for the purpose of making Findings of Fact and Conclusions of Law on all issues.

RELIEF SOUGHT BY THE PETITION FOR REHEARING

Respondent seeks a reconsideration of this Court's decision by way of rehearing.

STATEMENT OF FACTS

Respondent relies on the Statement of Facts heretofore set forth in her Brief on Appeal. In addition to the facts detailed therein Plaintiff and Respondent calls the Court's attention to the following:

1. The pre-trial order, which was prepared and "approved as to form and content" by counsel for both parties before being submitted to the Court for entry, provided that "this matter is set for jury trial . . ." (R.74-81).

2. No objection was made by Defendant that Plaintiff was not entitled to a jury trial, as provided by Rule 39(a) U.R.C.P.

3. The trial was thereafter held to a jury without reference to the idea that the jury was in any respect acting in an advisory capacity. The entire transcript which is a void of any reference to an "advisory" jury.

4. At the conclusion of the evidence the Court was requested by Defendant to submit the matter to the jury on special interrogatories - not on the theory that the jury was advisory but pursuant to Rule 49 U.R.C.P. which permits (but does not require) the Court to require the jury to return "a special written finding upon each issue of fact". (R. 88-116).

5. Following the Court's refusal to submit the matters to the jury for a special verdict, Defendant excepted to the Court's refusal to submit special interrogatories to the jury "on the basis that the first element of the Plaintiff's claim is an action for specific performance, and the jury should be a finder of fact only and cannot render a general verdict." (R. 704).

6. After the jury entered its verdict the jury was polled and found to be unanimous, after which the Court stated, "we will enter judgment accordingly." (R.706).

7. The Court then asked if counsel had anything further whereupon counsel for Defendant stated, "I have nothing". (R. 706).

8. The Court then directed counsel for Plaintiff to "prepare judgment accordingly," (R. 707) without reference to any findings of fact or conclusions of law and again inquired if counsel had anything further, whereupon both counsel responded in the negative. (R. 708).

9. The only reference to Findings of Fact and Conclusions of Law is contained in the Clerk's Minutes which were never signed by the Court nor made available to counsel and do not comport with the instructions given by the Court after the return of the jury's verdict. (R. 73).

10. Although present when the Court gave instructions to prepare the appropriate judgment on the verdict; counsel for Defendant failed to object or request the entry of Findings of Fact and Conclusions of Law. (R. 706, 707).

11. In compliance with the Court's direction, Plaintiff's counsel prepared and submitted a "judgment on the verdict" which was entered by the Court on October 25, 1978. (R. 163-164).

12. Defendant thereafter filed a "Motion for Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial" pursuant to Rule 50 U.R.C.P. (R. 171, 172).

13. The motion was made "on the grounds that the theory of estoppel was not proper in determining the case, defendant's motion for directed verdict should have been granted as a matter of law, and the verdict of the jury was supported by insufficient evidence." (R. 171).

14. Neither the Motion for Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial or Defendant's Memorandum in support thereof makes any reference to the jury verdict being "advisory" or that the Court erred

15. On December 1, 1978, the trial court entered a "Memorandum Decision" denying Defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial (R. 225); and Defendant thereafter appealed "from the memorandum decision." (R. 226).

16. The first time any issue was raised concerning the failure of the trial court to make Findings of Fact and Conclusions of Law was in Defendant's Reply Brief filed with this Court within a few days of the oral argument on appeal.

ISSUES

Plaintiff and Respondent has raised five issues for this Court to consider in connection with her Petition for Rehearing, as follows:

1. This Court erred in determining that the jury in this case was an "advisory" jury.
2. This Court erred in concluding that because the Clerk's Minute Entry (which was not signed by the trial judge) stated "Plaintiff's counsel to prepare and submit the Findings of Fact and Conclusions of Law and the Decree for the Court's signature," the trial judge contemplated the entry of Findings of Fact and Conclusions of Law and that Plaintiff's counsel failed to comply with the Court's direction.
3. This Court erred in determining that the trial court intended the jury verdict to be merely advisory.

4. This Court erred in not giving Plaintiff and Respondent an opportunity to brief the question of whether the failure of the trial court to make Findings of Fact and Conclusions of Law constituted reversible error.

5. This Court erred in determining that the failure of the trial court to make Findings of Fact and Conclusions of Law was reversible error under the facts of this case.

For discussion purposes, these issues have been grouped under two points:

I. Was the jury in this case an advisory jury or considered by the trial court or parties to be advisory only?

II. Assuming that the jury was "advisory", was the failure of the trial court to make Findings of Fact and Conclusions of Law reversible error under the facts of this case?

ARGUMENT

I. WAS THE JURY IN THIS CASE AN ADVISORY JURY OR CONSIDERED BY THE TRIAL COURT OR PARTIES TO BE ADVISORY ONLY?

This Court's opinion assumes that because the action here involved is equitable in nature that the role of the jury was and is advisory. In doing so, it fails to take into account the provisions of Section 78-21-1 U.C.A. 1993, which provides that "In actions for the recovery of specific real . . . property, with or without damages . . . an issue

of fact may be tried to a jury, unless a jury is waived or a reference is ordered."

In this case Plaintiff certainly did not waive a jury. On the contrary she demanded it, (R. 54) and certainly a suit to compel specific performance of a contract to convey real property involves the recovery of the same. See Holland v. Wilson, 8 U.2d 11, 327 P.2d 250, where this Court held Plaintiff was entitled to a jury in a suit to quiet title to real property. We quote from this Court's opinion in that case, as follows:

"It is our opinion that the above language, if given a reasonable and rational construction, must be interpreted as declaring that all issues of fact relating to possession and rights to possession of specific real or personal property may be determined by a jury unless a jury trial is waived. We see no merit to the fine distinction sometimes expressed to the effect that if a person seeks to recover possession of real property the action is legal and entitles him to a jury trial, whereas if he is in possession and seeks to prevent any interference with his possession the action is equitable and a jury trial may not be had, except in an advisory capacity. We are of the opinion that where the question is presented as to the right to possession, the right to a jury trial is guaranteed. Only by such a construction can the section be liberally construed to effect what we believe were the objects and intent of the same. (emphasis added). 327 P.2d at 252.

Rule 38(a), U.R.C.P. preserves the right to a trial by jury "as given by statute". Further, Rule 39(a) U.R.C.P. provides that when trial by jury has been demanded the "trial" demanded so demanded shall be by jury, unless . . . (2)

right of trial by jury of some or all of those issues does not exist." (Emphasis added).

In this case Plaintiff demanded a jury; and Defendant failed to file any objection thereto or make any motion that the Plaintiff was not entitled thereto. Nor did the court on its own motion raise any question to the right of Plaintiff to a jury trial.

Plaintiff therefore respectfully submits that she was entitled to a jury trial on the issues - not as an advisory jury but as the final determiner of the issues of fact.

However, this Court's opinion points to the Clerk's Minute Entry which stated: "Plaintiff's counsel to prepare and submit the Findings of Fact and Conclusions of Law and the Decree for the Court's signature." Of course, the Minutes of the Clerk's which are kept in the Minute Book pursuant to Rule 79(d)(4) U.R.C.P. are merely the Clerk's record "of the daily proceedings of the Court," and are not signed by the Judge or furnished to the parties. Obviously, in this case the Clerk improperly noted that the Court had directed the preparation of Findings of Fact and Conclusions of Law since the transcript of the proceedings clearly shows that the Court requested only the preparation of a judgment, which was done.

In view of the undisputed facts as to what actually occurred, Plaintiff respectfully submits that this Court was in error in determining that it was the intention of the Court to

court "to regard the jury verdict as merely advisory." On the contrary it appears clear that the provisions of Rule 39(c) U.R.C.P. apply to the effect that even in an equity case the trial court "with the consent of both parties may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." Certainly the demand for jury trial, the pre-trial order, and other proceedings clearly manifest the consent of the parties and the intention of the Court to have the verdict of the jury determinative of the issues of fact.

II. ASSUMING THAT THE JURY WAS "ADVISORY",
WAS THE FAILURE OF THE TRIAL COURT TO MAKE
FINDINGS OF FACT AND CONCLUSIONS OF LAW
REVERSIBLE ERROR UNDER THE FACTS OF THIS CASE?

This Court's opinion clearly points out that "Defendants raise the issue of the trial court's failure to make Findings of Fact and Conclusions of Law" for the first time in Defendant's trial brief. Because of this, Plaintiff did not have the opportunity to brief the matter before oral argument; and the Court has not had the benefit of Plaintiff's research and analysis. Although we ^{RECOGNIZE THE RIGHT OF} ~~request~~ this Court to consider the issue notwithstanding the untimeliness of its being raised, we respectfully urge that the Court's opinion incorrectly states the law with respect to the consequences of failure to make Findings of Fact and Conclusions of Law in circumstances such as these.

Rule 52(a) U.R.C.P. does not require the making of findings of fact and conclusions of law in all cases. The parties can, and frequently do, expressly waive the entry thereof. And in circumstances such as those present here, parties are deemed to have waived or are estopped to assert error in failure to make such findings and conclusions.

Such was the situation in the case of Kelly, et al. v. Shamrock Oil & Gas Corporation, et al., (171 F.2d 909), decided by the United States Court of Appeals, Fifth Circuit in 1948. There the plaintiff brought an action to cancel for fraud a conveyance of certain mineral land. Plaintiff demanded a jury trial and Defendant did not object thereto. The jury returned a verdict for plaintiff and the court entered judgment thereon.

On appeal the court held that although the case was an equity case it was unnecessary, notwithstanding Rule 52, to enter special findings of fact by the court, citing Rule 39. We quote:

...By Rule 39, after demand for jury trial has been made under Rule 38, such a trial is in order unless the parties consent to a trial by the Court, or the Court on its own initiative finds that a jury trial is not a right under the Constitution or statutes of the United States, or orders an advisory jury; and where there is no right of jury trial, by consent of both parties a jury trial may be ordered and the verdict has the same effect as if a jury trial had been a matter of right. The jury's verdict here is all that is necessary to support the judgment. 171 F.2d at 911.

Our Rules 38, 39 and 52, insofar as they are applicable to the facts of this case, are identical to the Federal Rules

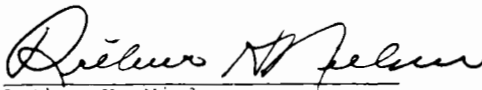
and indeed were adopted from them subsequent to the Kelly decision, supra, which interpreted and applied those rules in similar facts. We respectfully submit that such interpretation is now controlling in this case. See also, Sugarman v. B.C. Olsen (Ore. 1969) 459 P.2d. 545.

CONCLUSION

We sincerely hope that what has been said hereinabove explains why Findings of Fact and Conclusions of Law were not prepared by Plaintiff's counsel. The plain fact is that the Court did not direct counsel so to do. Nor did either the Court or counsel for the respective parties consider the entry of Findings of Fact and Conclusions of Law to be necessary since the case was tried to a jury without objection. This Court's decision opens the way in every case where jury trial is had without objection to raise the issue of failure of the court to make Findings of Fact and Conclusions of Law ^{IF} ~~as~~ the case is one where the right to a jury trial may have been raised initially.

We respectfully submit that this Court should grant a rehearing and determine those issues raised by Appellant which have not already been disposed of.

Respectfully submitted,



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Respondent

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief of Respondent were delivered to John H. Allen, CALLISTER, GREENE & NEBEKER, Attorneys for Appellants, 800 Kennecott Building, Salt Lake City, Utah 84133, this 30th day of May, 1980.

